Hector Rojas v. U.S. General Accounting Office

Docket No. 96-08

Date of Decision: December 22, 1998

Cite as: Rojas v. GAO (12/22/98)

Before: Jeffrey Gulin, Member, for the Board *en banc*; Michael Wolf, Chair; Harriet Davidson, Vice-Chair

Remand

Vacatur

Mootness

Settlement agreements

Precedent

MEMORANDUM AND ORDER

Introduction

This matter is before the Personnel Appeals Board (the Board) of the United States General Accounting Office (GAO or the Agency) on remand from the United States Court of Appeals for the Federal Circuit to consider a motion filed by Respondent, GAO, to vacate a prior Board decision in this matter. The motion requests that the Board vacate its final decision issued on March 5, 1998, in which the Board ruled that the Agency had improperly utilized reduction-in-force (RIF) procedures to separate Petitioner, Hector Rojas, from his employment with GAO. The Agency moves to vacate the Board's decision on the basis that the parties entered into a settlement agreement after filing an appeal with the Court of Appeals, but prior to the review, and the agreement provides that Petitioner Rojas would consent to vacatur of the Board's final decision. For the reasons set forth below, the motion is denied.

Background

On December 5, 1996, Hector Rojas filed a Petition for Review with the Board claiming that the RIF implemented by GAO was unlawfully targeted at him personally. An evidentiary hearing was held before then Board Member Nancy A. McBride. Because her term as a Member of the Board expired while the case was still pending, on June 6, 1997, Judge McBride transmitted a *recommended* decision to the full Board. See 4 C.F.R. §28.86(a) (1997). In her recommended decision, Judge McBride concluded that the Agency invoked RIF procedures for legitimate reasons that were not personally motivated. On July 7, 1997, Petitioner filed exceptions to the recommended decision for consideration by the full Board. On March 5, 1998, the Board issued

its final decision concluding that the RIF was, indeed, personally targeted at Petitioner in violation of RIF regulations. Accordingly, the Board ordered GAO to reinstate Petitioner with appropriate back pay.

GAO filed an appeal of the Board's decision with the Court of Appeals for the Federal Circuit. See *General Accounting Office v. Rojas*, Docket No. 98-6004 (docketed April 3, 1998). While the review was pending, the parties executed a settlement agreement which provides that GAO "will file a motion with the Federal Circuit . . . requesting that the Court vacate" the Board's final decision and that Petitioner "consents to this motion." *Id*., Stipulation of Settlement ¶9, (August 12, 1998). In accordance with the agreement, GAO moved the Court of Appeals to remand the case to the Board with instructions to dismiss the petition for review and vacate the Board's final decision. The Court of Appeals denied the motion but remanded the case "to allow the Board to consider a motion to vacate the decision in accordance with *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 29 (1994)." Docket No. 98-6004, Order at 1 (September 9, 1998). On October 21, 1998, GAO filed a motion with the Board to dismiss the original petition for review and vacate the Board's final decision. Petitioner filed no reply.

Discussion

Authority of the Board to Grant Vacatur

Relevant rules of procedure before the Board are codified at 4 C.F.R. part 28 (1997). The regulations do not address vacatur nor explicitly authorize the Board to grant a motion to vacate a prior decision of the Board. However, section 28.1(d) provides "[i]n considering any procedural matter not specifically addressed in these rules, the Board will be guided, but not bound, by the Federal Rules of Civil Procedure." Federal Rule of Civil Procedure 60(b) authorizes a federal district court to vacate its own final judgment under certain enumerated circumstances. See*, e.g.,* Fed. R. Civ. P. 60(b)(5) ("[I]t is no longer equitable that the judgment should have prospective application"); Fed. R. Civ. P. 60(b)(6) ("any other reason justifying relief from the operation of the judgment"). Accordingly, by analogy to Rule 60(b), section 28.1(d) of the Board regulations implicitly authorizes the Board to entertain a motion to vacate a prior decision.

The Remand Order

After denying the Agency's motion, the Court of Appeals remanded to allow the Board the opportunity to consider a motion to vacate "in accordance with *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 29 (1994)." Docket No. 98-6004, Order at 1 (September 9, 1998). In *U.S. Bancorp,* the Supreme Court enunciated an "extraordinary circumstances" standard by which federal appellate courts may grant motions to vacate district court final judgments which have been rendered moot by voluntary action of the parties (such as by

settlement). However, the Court did not explicitly apply that standard to the district courts when faced with motions to vacate *their own* final judgments. To the contrary, the Court stated:

> Of course even in the absence of, or before considering the existence of, extraordinary circumstances, a court of appeals presented with a request for vacatur of a district-court judgment may remand the case with instructions that the district court consider the request, which it may do pursuant to Federal Rule of Civil Procedure 60(b).

513 U.S. at 29. Accordingly, it appears that the Court declined to apply the *U.S. Bancorp* standard to the district courts. Rather, the district courts should continue applying the Rule 60(b) standard of their respective circuits. See *American Games, Inc. v. Trade Products, Inc.*, 142 F.3d 1164, 1167-68 (9th Cir. 1998); *cf. Pressley Ridge Schools v. Shimer*, 134 F.3d 1218, 1221-22 (4th Cir. 1998) (appeal dismissed without prejudice to parties' rights to file motion to vacate in district court under Rule 60(b)). By analogy, we conclude the Board is similarly not bound by *U.S. Bancorp.* This conclusion accords with the remand order herein. The Court of Appeals denied the motion but also remanded "in accordance with *U.S. Bancorp* . . .," specifically citing page 29 of the decision, quoted in relevant part *supra*. We interpret these actions as an election by the Court of Appeals to remand as explicitly invited under *U.S. Bancorp* and *not* a directive for the Board to apply the substantive standard enunciated in *U.S. Bancorp.* The Board remains free to adopt a Rule 60(b) standard[1] pursuant to 4 C.F.R. §28.1(d), adopt the *U.S. Bancorp* standard, or fashion its own standard.

Adoption of the *U.S. Bancorp* Standard

Though not *bound* by the *U.S. Bancorp* standard, the Board finds the policy rationales articulated in that opinion to be compelling and elects to adopt the standard enunciated therein.[2] In *U.S. Bancorp*, the Court held that absent extraordinary or exceptional circumstances, "mootness by

[1] The Federal Circuit standard for considering a Rule 60(b) motion is actually quite similar to that enunciated in *U.S. Bancorp. See, e.g., CTS Corp. v. Piher Int'l Corp*., 727 F.2d 1550, 1555 (Fed. Cir. 1984) ("exceptional or extraordinary circumstances" need be shown before granting a Rule 60(b) motion (citing *Ackermann v. United States,* 340 U.S. 193 (1959)).

[2] Other administrative agencies have also adopted the *U.S. Bancorp* standard. See*, e.g., Panhandle Eastern Pipe Line Co.*, 83 F.E.R.C. P61, 353 (1998); *Computer Data Systems, Inc. v. Department of Energy*, GSBCA 12824-P, 1995 GSBCA LEXIS 88 (Board of Contract Appeals, Feb. 23, 1995); *Heining v. General Services Administration*, 66 M.S.P.R. 571 (1995). But *cf. Highland Yarn Mills, Inc. v. Amalgamated Clothing and Textile Workers Union,* 315 N.L.R.B. 1169 (1994) (NLRB vacates "interlocutory" show cause order upon settlement of case, finding *U.S. Bancorp* "which dealt with vacation of civil judgments, inapposite").

reason of settlement does not justify vacatur of a judgment under review." 513 U.S. at 29. It recognized that a party may have an "equitable entitlement" to the extraordinary remedy of vacatur, such as where a party seeks appellate review of an adverse decision "but is frustrated by the vagaries of circumstance." *Id*. at 25-26 (reaffirming the "happenstance" standard enunciated in *United States v. Munsingwear, Inc*., 340 U.S. 36 (1950)). But, where mootness results from settlement, the losing party has forfeited its legal remedy by the ordinary process of appeal, thereby surrendering its claim to the equitable remedy of vacatur. "The judgment is not unreviewable, but simply unreviewed by his own choice." *Id.* at 25. The case would stand no differently than if jurisdiction to review were lacking because the losing party failed to appeal at all. *Id.*

In articulating the policy considerations behind the "extraordinary circumstances" standard, the Court noted that permitting a party to seek relief from the consequences of a judgment not through appeal, but through a "secondary remedy of vacatur as a refined form of collateral attack on the judgment would . . . disturb the orderly operation of the federal judicial system." *Id*. at 27. Moreover, "[j]udicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by vacatur." *Id.* at 26 (quoting *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 40 (1993)).

Finally, the Court addressed the issue of facilitation of settlement and observed that the liberal granting of vacatur may promote settlement *after* judgment is rendered and before appellate review, but, "it may *deter* settlement at an earlier stage." *Id*. at 28 (emphasis added). Some litigants might be encouraged to "roll the dice rather than settle in the district court . . . if, but only if, an unfavorable outcome can be washed away by a settlement-related vacatur. And the judicial economies achieved at the district-court level are ordinarily much more extensive than those achieved by settlement on appeal." *Id.*

All of these policy considerations are applicable to both hearings on-the-merits and appellate proceedings before the Board.

Application of the *U.S. Bancorp* Standard

With respect to the motion before us, the Agency has not demonstrated extraordinary circumstances justifying vacatur.[3] The Agency merely asserts that denial of vacatur "could adversely affect the frequency of settlement in the future." Motion to Dismiss Petition at 3. But, as the *U.S. Bancorp* Court soundly reasoned, a Board policy favoring the grant of vacatur could actually discourage settlement at the more advantageous administrative hearing level. And

[3] Indeed, the Agency understandably urges the Board to adopt a much less strict standard. Motion to Dismiss Petition at 3.

contrary to the Agency's contention, the public policy favoring the orderly operation of the Board and the precedential effect[4] of the decision outweighs any policy favoring post-decisional settlements. The Board's final decision in *Rojas v. GAO* constitutes a valuable precedent[5] governing the Agency's conduct of RIF actions. The issues addressed in the decision may arise before the Board again. Moreover, the decision was the result of extensive hearings and Board deliberations along with the expenditure of valuable time and resources. It would be contrary to the public interest to vacate the Board's final decision merely because the parties ultimately reached a settlement.

Accordingly, the Agency's Motion to Dismiss Petition for Review and Vacate Personnel Appeals Board Decision is hereby **denied**.

SO ORDERED.

[4] As in the instant case, final decisions reviewed by the full Board have precedential effect. *See* 4 C.F.R. §28.87.

[5] As a result of a change in membership on the Board, a majority of the Board now supports the concurring opinion in *Rojas*. Notwithstanding, the Board concludes that granting vacatur as a result of a fortuitous shift in Board sentiment arising out of a change in Board composition would disrupt orderly and proper processes by encouraging future collateral attacks upon the Board's final decisions.